

*See Dissenting Opinion*

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH OLIVER DeMAGNUS III,

Defendant and Appellant.

E074271

(Super.Ct.No. SWF003600)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Joseph Oliver DeMagnus III, filed a petition for resentencing pursuant to Penal Code section 1170.95,<sup>1</sup> which the court dismissed without prejudice. After defense counsel filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the facts, a statement of the case, and two potentially arguable issues: whether the court erred in denying defendant's petition on the bases that he was the actual shooter and that he was convicted of attempted murder, rather than murder. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Defendant used a gun to commit a robbery. As he ran from the crime scene, defendant fired several shots at two brothers who were working at the business. The victim of the gunshot was hit in the left shoulder; the bullet entered his left shoulder and exited out his back.

On January 17, 2008, a jury found defendant guilty of two counts of attempted murder, two counts of assault with a firearm, one count of attempted robbery, one count of robbery, and one count of being a felon in possession of a firearm. The jury additionally found true allegations that in his commission of the counts 1, 2, 5, and 6 offenses, defendant personally discharged a firearm causing great bodily injury to

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Defendant requests we take judicial notice of the record in his previous appeal in *People v. DeMagnus* (Aug. 28, 2009, E046214) [nonpub. opn.]. We grant the request as to the opinion, dated August 28, 2009, affirming the judgment. (Evid. Code § 459.)

another, and during his commission of the counts 3 and 4 offenses, he personally used a firearm. The jury also found true allegations that defendant had suffered two prior strike convictions. The court sentenced defendant to an indeterminate term of imprisonment of 139 years to life. This court affirmed the judgment.

On May 28, 2019, defendant filed a petition for resentencing in which he maintained he had been convicted of first or second degree murder pursuant to the felony-murder rule or the natural and probable consequences doctrine. The People filed a response asserting defendant's petition should be denied because he was the *actual shooter* and had only been convicted of *attempted murder*.

Defendant filed a reply in which he noted that he had been convicted of *attempted murder*, not murder. Counsel for defendant thereafter filed a reply in support of the petition, also noting that defendant had been convicted of *attempted murder*. At a hearing on the petition, the People orally moved to dismiss the petition because defendant was the *actual shooter* and was only convicted of *attempted murder*. The court dismissed the petition on the bases asserted by the People in their motion.

## II. DISCUSSION

We offered defendant an opportunity to file a personal supplemental brief, which he has not done. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues. (*People v. Munoz* (2019) 39 Cal.App.5th 738, 753, review granted Nov. 26, 2019, S258234 [§ 1170.95 relief does not apply to defendants convicted of attempted murder].)

### III. DISPOSITION

The judgment is affirmed.

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McKINSTER  
J.

I concur:

RAMIREZ  
P. J.

[*P. v. DeMAGNUS III*, E074271]

MENETREZ, J., Dissenting.

The appellate review procedures under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), in which we review the record ourselves to determine whether there are any arguable issues, apply “only to a defendant’s first appeal as of right.” (*People v. Thurman* (2007) 157 Cal.App.4th 36, 45; *People v. Serrano* (2012) 211 Cal.App.4th 496, 498 (*Serrano*).) *Wende/Anders* review is highly unusual and rooted in the constitutional right to counsel, and courts have repeatedly declined to apply it in other contexts. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 554-555; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 535; *In re Sade C.* (1996) 13 Cal.4th 952, 959; *People v. Kisling* (2015) 239 Cal.App.4th 288, 290; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1425; *People v. Taylor* (2008) 160 Cal.App.4th 304, 307-308; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570; 579.) Because this appeal concerns a postjudgment proceeding in which there is no constitutional right to counsel, appellant has no right to *Wende/Anders* review. Because appellant’s counsel filed an opening brief raising no issues, and appellant was notified but did not file a supplemental brief, we should not affirm but rather should dismiss the appeal as abandoned. (*Serrano*, 211 Cal.App.4th at pp. 503-504.) I therefore respectfully dissent.

MENETREZ

J.